D.P.U. 92-122-A

Petition of Plymouth Rock Energy Associates, L.P., under the provisions of 220 C.M.R. § 1.04(5)(a) for summary judgment and injunctive relief to require execution of a long-run standard power purchase contract in accordance with 220 C.M.R. § 10.07(1).

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FOR: PLYMOUTH ROCK ENERGY ASSOCIATES
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Respondent

I. INTRODUCTION

A. Overview

On April 26, 1995, the Supreme Judicial Court ("Court") remanded to the Department of Public Utilities ("Department") its Order in Plymouth Rock Energy Associates, D.P.U. 92-122 (1994). Plymouth Rock Energy Associates v. Department of Public Utilities, 420 Mass. 168 (1995). This Order responds to the Court's Remand.

B. Procedural History

On May 18, 1992, Plymouth Rock Energy Associates, L.P. ("PREA")[1] filed with the Department (1) a Petition for Review ("Petition"), (2) a Motion for Expedited Summary Judgment and Injunctive Relief ("Motion"), and (3) a Memorandum in Support of Petition and Motion ("PREA Memorandum"). On June 1, 1992, Commonwealth filed (1) a Response and Opposition to PREA Petition, (2) a Memorandum in Support of Response and Opposition to PREA Petition, and (3) a Response in opposition to the PREA Motion. This matter was docketed as D.P.U. 92-122.

On February 18, 1994, the Department issued its Order in D.P.U. 92-122. On March 14, 1994, PREA submitted an appeal of the Department's Order to the Court, and on April 26, 1995, the Court issued its ruling, vacating the Department's Order and remanding it to the Department. Following the Court's remand, PREA submitted a letter to the Department ("PREA Letter") recommending a final disposition of the proceeding.

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[1] PREA is a limited partnership formed to construct a five megawatt ("MW") natural gas-fired cogeneration facility in Kingston, Massachusetts, and to provide steam to the Independence Mall which is heated and cooled by electricity.

Commonwealth submitted a response to the PREA Letter ("Commonwealth Letter").

C. PURPA

1. Federal Implementation

The requirement of electric companies to contract with alternative energy and small power producers originates in the Public Utility Regulatory Policies Act of 1978 ("PURPA"). P.L. 95-617 (1978). PURPA was enacted to encourage the development of alternative power and cogeneration resources by nonutility power generators in order to reduce the reliance on fossil fuels. Under PURPA, a power generation facility that meets certain specified requirements is characterized as a qualifying facility ("QF"). PURPA § 210(e); 16 U.S.C. § 824a-3(e). PURPA required the Federal Energy Regulatory Commission ("FERC") to establish regulations that obligate electric companies to sell to and purchase from QFs. PURPA § 210(a); 16 U.S.C. § 824a-3(a). The FERC promulgated rules to set a framework for PURPA's implementation by the states. See 18 C.F.R. §§ 292 et seq. (subparts A-G). Pursuant to PURPA, electric companies are required to make purchases "as available" or to enter into "legally enforceable obligation[s]" for the delivery of energy or capacity over a specified term … based on the avoided costs calculated at the time the obligation is incurred. 18 C.F.R. § 292.304(d).[2]

2. Massachusetts' Implementation

On July 23, 1981, the Department issued rules to implement the intent of

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[2] Avoided costs are defined as the incremental cost to an electric utility of energy or capacity, or both, which, but for the purchase from the qualifying facility, the utility would generate itself or purchase from another source. 18 C.F.R. § 292.101(b)(6).

Sections 201 and 210 of PURPA. QF Rulemaking, D.P.U. 535 (1981); See 220 C.M.R. §§ 8.00 et seq. See also QF Rulemaking, D.P.U. 535-A (1983). The Department, in response to a petition by the Secretary of Energy Resources,[3] opened an investigation to amend the rules governing sales of electricity by small power producers and cogenerators to utilities and sales of electricity by utilities to small power producers and cogenerators. See QF Investigation, D.P.U. 84-276 (1985). On August 26, 1986, the Department issued rules amending 220 C.M.R. §§ 8.00 et seq.[4] See QF Investigation, D.P.U. 84-276-B (1986). See also QF Investigation, D.P.U. 84-276-A (1986).

On August 31, 1990,[5] the Department issued IRM Rulemaking, D.P.U. 89-239, promulgating the integrated resource management ("IRM") regulations.[6] The IRM regulations established a framework under which investor owned electric companies would plan for, solicit, and procure additional resources in order to meet their obligation to provide

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[3] The Executive Office of Energy Resources is now the Division of Energy Resources within the Department of Economic Development.

[4] Among other things, the amended QF regulations provided for short-run and long-run standard contracts as simple, cost-effective and efficient mechanisms for small power producers and electric companies to enter into the legally enforceable obligations mandated by PURPA. See 220 C.M.R. § 8.04 and 220 C.M.R. § 8.05, respectively.

[5] On June 1, 1995, the Department issued an Order replacing 220 C.M.R. §§ 10.00 et seq. with integrated resource planning ("IRP") regulations. IRM Streamlining, D.P.U. 94-162 (1995). The regulations at 220 C.M.R. §§ 10.00 et seq. cited in this Order are those that were in effect when the Department issued D.P.U. 92-122. The IRP regulations make no provision for a long-run standard contract.

[6] The IRM regulations provided for an all-resource solicitation process in which qualifying facilities, facilities offered by independent power producers, and other supply-side resources are considered with demand-side resources to meet an identified resource requirement at least cost.

reliable electric service to ratepayers at the lowest possible cost and with the least environmental impact.[7] The IRM regulations also provided for a long-run standard contract. 220 C.M.R. § 10.07(1)(a). The long-run contracting provisions of the IRM regulations, 220 C.M.R. § 10.07(1), replaced the long-run contracting provisions of the QF regulations, 220 C.M.R. § 8.05(1). See 220 C.M.R. 10.01(2)(c). The short-run contracting provisions of the QF regulations, 220 C.M.R. § 8.04, were not affected by the IRM regulations.

II. D.P.U. 92-122

In D.P.U. 92-122, the Department noted that the long-run contracting provisions of 220 C.M.R. § 10.07(1) replace the provisions of 220 C.M.R. § 8.05(1). D.P.U. 92-122, at 9. See 220 C.M.R. § 10.01(2)(c). The Department stated that the provisions of 220 C.M.R. § 10.07(1)(a) were applicable to PREA's proposal. D.P.U. 92-122, at 10. The Department noted that Commonwealth had no current need for capacity and no final IRM award group. Id. at 12, citing Cambridge Electric Light Company and Commonwealth Electric Company, D.P.U. 91-234 (1993). Therefore, the Department found that PREA was not entitled to the Company's RFP 2 prices, which had included capacity payments. Id. The Department stated that PREA was entitled to a long-run standard contract at Commonwealth's short-run energy purchase rate. Id. The Department determined that the appropriate price for the PREA contract was the Company's QF rate available at the time

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[7] The IRM regulations provided that if no need for additional capacity were identified during the planning period, a company would solicit energy or energy-savings only. 220 C.M.R. § 10.03(10)(c). In D.P.U. 93-154, the Department determined that an energy-only solicitation would not be required for companies that participate in the short-term energy market.

PREA first approached the Company, i.e., the rate for the first quarter of 1992, which was established in Commonwealth Electric Company, D.P.U. 91-3D (1991). Id.

III. THE COURT DECISION

A. Remand

The Court stated that the Department "acted well within its authority in concluding that the QF regulations did not apply and, specifically, that the RFP 2 award prices were not relevant." 420 Mass. 168, at 174. The Court stated that the Department's findings indicate that Commonwealth would require new generating capacity at some point during the contract with PREA. Id. at 176. The Court noted that the Department approved a purchase price that did not include any capacity payment for the entire term of the contract. Id. The Court also noted that the Department's only explanation for selecting the purchase price was that it represented the short-run energy purchase rate established in early 1992 when PREA first requested a contract with Commonwealth, and that this appears inconsistent with the capacity need findings of D.P.U. 91-234, as well as the requirements of PURPA. Id. The Court stated that the Department cannot ignore the avoided cost requirement of PURPA and arbitrarily assign a purchase price. Id. The Court stated that the Department is obligated to provide a reasoned decision on why a contract price that does not include any capacity payments for most of its term, at a rate that would appear to be well below Commonwealth's avoided costs, is permissible under PURPA and its own regulations. Id.

B. Position of the Parties

1. PREA

PREA asserts that the Court's remand establishes the following: (1) PREA must

receive Commonwealth's full avoided cost, including capacity and energy, relevant to its entitlement [emphasis in original]; (2) Commonwealth's avoided costs for the twenty-year term of the anticipated contract ranged from 5.6 cents a kilowatthour in 1997 to twenty-nine cents a kilowatthour in 2016; and (3) the long-run standard contract should encompass a twenty-year period (PREA Letter at 4). PREA asserts that the only remaining issue is Commonwealth's full avoided cost at the time of PREA's entitlement, … [which] is at least equal to Commonwealth's calculation on May 28, 1992, [and] which is a matter of record in this proceeding (id. at 4). PREA requests that the Department "direct the parties to meet to negotiate in good faith to resolve this matter …." (id. at 5). PREA states that, should negotiations not be fruitful, it reserves its rights on all matters (id. at 6).

2. Commonwealth

Commonwealth argues that PREA's request would result in excessive costs and unnecessary burdens on customers (Commonwealth Response at 1). Commonwealth responds that "this period of excess capacity, with [its] vibrant low-cost wholesale market and impending competition, is no time to require long-term commitments at excessive costs. That will only slow down the movement to increased competition and efficiency, and likely result in greater stranded costs" (id. at 2).[8]

Commonwealth states that the Remand requires only that the Department provide a better-supported decision regarding pricing to PREA (id. at 2). Commonwealth also indicates that the Remand makes no findings regarding the period across which

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[8] See Electric Industry Restructuring, D.P.U. 95-30, at 29 (1995) for a discussion of stranded costs. See also Electric Industry Restructuring, D.P.U. 96-100 (1996).

Commonwealth should purchase from PREA, but rather leaves the matter for the Department to decide (id. at 3).

Commonwealth believes that the Department and FERC precedent support the Company's position. Commonwealth proposes to pay PREA the P-1 Rate, as determined from time to time, to purchase energy and capacity to the extent included in the P-1 Rate, for up to 20 years (id. at 4, n.3). Commonwealth suggests that its true avoided costs might be an even lower, 2.4 cents per kilowatthour (id. at 4-5). Commonwealth notes that those charged with enforcing PURPA have allowed a variety of results in recognition of a utility's lack of need for capacity, and that such decisions support either the Department's findings in D.P.U. 92-122 or Commonwealth's proposal (id. at 4). Commonwealth cites the findings of other state commissions that have excluded capacity costs in payments to QFs "in the context of lack of need for some period" (id. at 6).

Commonwealth states that if the Department chooses a course other than providing additional reasoning for its decision in D.P.U. 92-122, it must take a careful look at the avoided costs that would apply to any purchase from PREA and that PREA's suggested use of 1991 avoided costs would not be appropriate (id. at 6). Commonwealth emphasizes that no price under PURPA would be proper unless it is consistent with the avoided cost standard and just and reasonable rates to customers (id. at 7, citing 16 U.S.C. 824a-3(b)(1) and 18 C.F.R. § 292.304(a)(1)(i)). Commonwealth suggests that if this cannot be achieved, it might be appropriate to grant Commonwealth a waiver of its obligation to purchase from PREA,

pursuant to 220 C.M.R. § 10.07(1) (id. at 7).[9]

C. Analysis and Finding

The IRM regulations provide that developers of small projects (i.e., those "not greater than five megawatts, or one percent of the host company's annual peak demand, whichever is lower") need not participate in the somewhat lengthy, more resource intensive RFP processes. 220 C.M.R. § 10.07(1). Instead, the regulations permit the developers to pursue contracts with electric companies with individual purchase prices that are "equivalent in value" to those paid to the proponents of the winning projects in an electric company's most recent IRM solicitation. Id.

In D.P.U. 91-234, the Department conducted its most recent review of Commonwealth's need for additional resources, which would establish the basis for an avoided costs calculation. The Department determined that a projected need of 30 MW in 2001 was speculative and that exposing ratepayers to the capacity payments that would result from a solicitation based on this projection would not be appropriate.[10] Id. at 124-125. In making this finding the Department considered the issue of whether Commonwealth and Cambridge should be required to conduct a solicitation for capacity in response to the "small need for capacity late in the planning horizon." Id. at 124.

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[9] To the extent the Department could waive the requirements of 220 §§ 8.00 et seq., such a waiver must also be consistent with the requirements of PURPA.

[10] Importantly, the Department made no findings on the need for capacity in the years after the planning horizon prescribed by the IRM regulations. The contention that a capacity need in the year 2001, the last year in the D.P.U. 91-234 planning horizon, should be translated into a capacity need in all years contemplated by the long-run standard contract is not supported by the record in D.P.U. 91-234.

> The Department notes that (1) the deficiency identified is small relative to the total capability of the Companies' resource inventory, and (2) the deficiency appears in the last year of the forecast period; these are mitigating factors influencing our decision whether to require the Companies to issue a capacity RFP in this IRM cycle. Given consideration of these factors and the arguments raised by the Companies in this regard, the Department finds that ratepayer interests would not be served by an immediate solicitation for additional capacity, which would involve commensurate financial obligations. Rather it would be appropriate to delay any resource solicitation until a future IRM cycle.

Id.

The Department concluded that it would not be appropriate for Commonwealth to make capacity payments to those who would offer capacity in response to a very speculative need assessment. In other words, the Department determined that the Company's avoided capacity costs were zero through the year 2001. The Department's Order in D.P.U. 92-122, which sought to ensure that a small power provider was afforded payments that would be "equivalent in value" to those that were afforded to bidders in the IRM process, reflected this conclusion: both those who would offer capacity in the IRM process and PREA were denied the opportunity to sign a long-run contract that would entitle them to receive capacity payments in response to a distant and speculative need projection.

The conclusion that PREA should not be afforded the opportunity to sign a long-run contract that would entitle it to receive capacity payments for unneeded capacity is consistent with the requirements of PURPA. First, PURPA requires that the operators of qualifying facilities be compensated at rates that reflect an electric company's avoided energy and

capacity costs. PURPA § 210(b), 16 U.S.C. § 824a-3(b); 18 C.F.R. § 292.304(d).[11] PURPA does not require that ratepayers be exposed to the risk of paying for unneeded capacity. FERC regulations implementing PURPA state that "[n]othing in these [regulations] requires any electric utility to pay more than the avoided costs for purchases." 18 C.F.R. § 292.304(b). The Department concludes that, because the Company's capacity need is uncertain, to require capacity payments would expose ratepayers to a significant and unwarranted risk of paying more than actual avoided costs for power from PREA.

Second, PURPA sets no requirement for the term of the contract.[12] The short-run contracting provisions of the QF regulations, 220 C.M.R. § 8.04(1), provide that qualifying facilities are eligible to receive a utility's full short-run energy and capacity rates with or without a contract. The short-run energy purchase rate, adjusted by the Department quarterly, will include capacity payments when and if Commonwealth needs additional capacity. 220 C.M.R. § 8.04(5). Therefore, compliance with 220 C.M.R. § 8.04 would satisfy in full the PURPA requirement of Commonwealth to enter into a legally enforceable obligation and be compensated at a rate consistent with the Company's avoided costs.

PURPA extends to state public utility commissions considerable latitude to implement its provisions so as not to expose ratepayers to the risk of excessive costs. 16 U.S.C.

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[11] As noted, electric companies are required to make purchases "as available" or to enter into "legally enforceable obligation[s]" for the delivery of energy or capacity over a specified term … based on the avoided costs calculated at the time the obligation is incurred. 18 C.F.R. § 292.304(d).

[12] The IRM regulations provided that electric companies shall enter into a long-run standard contract with the developers for a period not to exceed 20 years. 220 C.M.R. § 10.07(1)(a).

§ 824a-3(b). The Department finds that to impose such risk on Commonwealth's customers would not be "just and reasonable" and therefore would violate PURPA. 16 U.S.C. § 824a-3(b)(1); 18 C.F.R. 292.304(a)(1)(i). Moreover, the Department finds that, under the particular circumstances of this proceeding, exposing the ratepayers of the Company to this risk also would be inconsistent with the public interest.[13] Accordingly, the Department will not require the Company to enter into a long-run standard contract with PREA. Instead, PREA is entitled to the short-run energy purchase rate in accordance with 220 C.M.R. § 8.04, and to capacity payments if, and only when Commonwealth is capacity deficient.

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[13] The Department will not allow the Company to recover from ratepayers the stranded cost associated with above-marketable investments that may result from a power purchase agreement entered into after August 15, 1995. See Electric Industry Restructuring, D.P.U. 95-30, at 33 (1995).

IV. ORDER

Accordingly, after due consideration, it is

ORDERED: That Plymouth Rock Energy Associates, L.P., is entitled to the short-run energy purchase rate prescribed by 220 C.M.R. § 8.04.

By Order of the Department,

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Mary Clark Webster, Commissioner

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Janet Gail Besser, Commissioner